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NO. 84-6982

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLIE L. BURR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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REPLY BRIEF ON

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

PAGE

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THE FLORIDA SUPREME COURT, IN UPHOLDING THE TRIAL COURT'S OVERRIDE OF A JURY'S RECOMMENDATION OF LIFE WHICH WAS BASED SOLELY UPON THEIR DOUBT AS TO BURR'S GUILT, VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS THE FLORIDA SUPREME COURT UNCONSTITUTIONALLY LIMITED THE RELEVANT EVIDENCE THE JURY COULD CONSIDER WHICH REFLECTED UPON THE CHARACTER OF THE OFFENSE.

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CERTIFICATE OF SERVICE

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REASONS FOR GRANTING THE WRIT

A. Introduction

The State of Florida, apparently recognizing that petitioner is entitled to review in this Court if the question he had presented is an accurate statement of the legal and ethical principles at issue in this case [see the state's brief in opposition, p.9], has attempted to rephrase the question and to bury the issue under a mound of verbiage. Petitioner, in reply, will show (1) that the issue he has raised is one of federal constitutional dimension, predicated on the Eighth and Fourteenth Amendments and the principles set forth in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982); (2) that it can reasonably be inferred that the basis for the jury's life recommendation in this case was the existence of some residual doubt as to petitioner's guilt, and that, in any event, the Florida Supreme Court has clearly (if not consistently) held, in this and other cases, that such residual doubt is as a matter of law an unreasonable and irrelevant consideration for the jury in deciding whether to recommend, and the judge in deciding whether to impose, the death penalty or a life sentence; and (3) that the overwhelming voice of legal reasoning and precedent (including, inter alia, the Model Penal Code provisions upon which Florida's and most other states' death penalty statutes are based), as well as common sense and simple fairness, require that residual doubt as to a defendant's guilt be recognized as a relevant and important consideration in capital sentencing, in accordance with the principles of Lockett and Eddings, and with the societal values embodied in the Eighth Amendment.

B. The Federal Constitutional Issue

The Supreme Court of Florida squarely held in this case that residual doubt as to a defendant's guilt, or the possibility of his innocence, or the relative weakness or inconclusiveness of the evidence of guilt are, as a matter of law, unreasonable and irrelevant considerations in capital sentencing. As it had done in Buford v. State, 403 So.2d 943, 953 (Fla. 1981), and

as it had done sub silentio in Heiney v. State, 447 So.2d 2d 210 (Fla. 1984) [see Heiney v. Florida, ___ U.S. ___, ___ S.Ct. ___, 83 L.Ed.2d 237 (1984) (Justices Marshall and Brennan dissenting from denial of certiorari)], the state Supreme Court took the simplistic view that:

> ... [A] convicted defendant cannot be "a little bit guilty." It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath to say someone else may have done it, so we recommend mercy.

Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985).

In his brief on appeal, petitioner argued strenuously that residual doubt as to guilt is a reasonable, even a compelling, basis for a life recommendation, and that the Eighth and Fourteenth Amendments, and the principles of Lockett v. Ohio, require that under such circumstances the life recommendation be given effect.[1] [See Appendix D 41-50, E 10-11]. As the state, in its brief in opposition to certiorari (p.8), correctly asserts, the Florida Supreme Court did not address the constitutional issue, and instead "perceived and resolved the issue as one resting solely on state grounds." However, the Florida Supreme Court, as it did in Buford and Heiney, perceived and resolved the issue wrong. Regardless of whether it purports to do so as a matter of federal law or as a matter of state law, a court cannot constitutionally preclude consideration of relevant mitigating factors.[2] Lockett v. Ohio, supra, 438 U.S. at

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[1] Under the so-called Tedder standard, a Florida trial judge may not override a life recommendation unless the facts justifying a death sentence are "so clear and convincing that no reasonable person could differ." See e.g. Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Provence v. State, 337 So.2d 783, 787 (Fla. 1976); Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981); Walsh v. State, 418 So.2d 1000, 1003 (Fla. 1982). Where there is any reasonable basis for the jury's life recommendation, the trial court is not free to substitute his own judgment to override it. See Shue v. State, 366 So.2d 387, 390 (Fla. 1978); Malloy v. State, 382 So.2d 1190, 1193 (Fla. 1979); Odom v. State, 403 So.2d 936, 942 (Fla. 1981); Walsh v. State, supra, at 1003. This Court, in rejecting constitutional challenges to the "life override" procedure, has done so on the assumption that the Florida Supreme Court "takes [the Tedder] standard seriously." Spaziano v. Florida, 468 U.S. ___, 104 S.Ct. ___, 82 L.Ed.2d 340, 356 (1984).

[2] Presumably, for example, the Ohio Legislature perceived the issue as one of "state law" when it enacted the statute which was subsequently held unconstitutional in Lockett because it precluded consideration of relevant mitigating factors. Notwithstanding the state's attempt to obfuscate the issue, the fact remains that a state court does not necessarily need to mention the federal constitution in order to violate it.

992. See People v. District Court of State, 586 P.2d 31, 35 (Colo. 1975). Thus, the real question to be resolved here is whether matters regarding residual doubt as to guilt, or the possibility of innocence, or the inconclusiveness of the evidence of guilt are in fact relevant considerations in determining whether to recommend or impose the death penalty. And the answer is that of course these matters are relevant. ALI, Model Penal Code, Section 201.6(1), p.107 (Off. Draft, 1980); see e.g. Furman v. Georgia, 408 U.S. 238, 366-68 (1972) (Justice Marshall concurring); Heiney v. Florida, supra, 83 L.Ed.2d at 238 (Justices Marshall and Brennan dissenting from denial of certiorari); Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966); Smith v. Balkcom, 660 F.2d 573, 580-82 (5th Cir. 1981); Smith v. Wainwright, 741 F.2d 1248, 1255 (11th Cir. 1984); People v. District Court of State, supra, at 35.

C. The Basis of the Jury's Life Recommendation

The state next attempts to confuse the issue by characterizing as "speculation" petitioner's contention that residual doubt as to guilt was the basis, or a basis, for the jury's life recommendation. The state disingenuously suggests that "if Respondent engaged in such speculation, it could, on equally sound footing, state that the jury's life recommendation ... was instead occasioned by the emotional display of Petitioner's mother at the sentencing proceeding (R 319, 451, 452, 455)...."[3] [State's brief in opposition, p.10]. First of all, petitioner is under no obligation to demonstrate that residual doubt as to guilt was the only conceivable basis for the life recommendation. Under the Tedder standard, where there is any reasonable basis for the jury's life recommendation, the trial court is not free to

[3] Burr's mother, Shirley Cooper, testified briefly that Burr's father died when he was young, that she used to take Burr to church and Sunday School when he was a child, that he worked in the landscaping business when he got old enough to work, and that he was a friendly person who was not a disciplinary problem and did not have a bad temper (R 450-51). Ms. Cooper testified that she loved her son and would like to see him be able to live (R 450-51). Apparently, Ms. Cooper was crying at that point in her testimony. The references to an "emotional display" at pages 452 and 455 of the record are from the prosecutor's closing argument, in which he told the jury that a mother's love for her son was understandable, but not to forget the victim, "Steve Hardy never came home. He never will come home" (R 452, 455-56).

substitute his own judgment to override it. See Shue v. State, supra, at 390; Malloy v. State, supra, at 1193; Welty v. State, supra, at 1164; Odom v. State, supra, at 942; Walsh v. State, supra, at 1003: Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982); Cannady v. State, 427 So.2d 723, 731 (Fla. 1983). In Gilvin v. State, supra, at 999, the Florida Supreme Court, properly applying the Tedder standard, held that the trial court erroneously overrode the jury's life recommendation, noting that "[t]here was evidence of non-statutory mitigating factors ... upon which the jury could have based its life recommendation even though the trial court, in its judgment, was not necessarily compelled to find them." See Welty v. State, supra, at 1164-65; Cannady v. State, supra, at 731.

In the present case, defense counsel's closing argument in the penalty phase was brief and to the point (R 459-66). The only statutory mitigating circumscance he even mentioned, in passing, was Burr's age, which was 21 (R 461). Rather, his entire argument was focused on the inconclusive character of the evidence of Burr's guilt.[4] [In order to comply with the 10 page limitation of Supreme Court Rule 22, the pertinent portions of defense counsel's argument are set forth in Appendix J, which is attached to this reply brief].

Residual doubt as to guilt was thus, without question, the main factor in mitigation which the defense proffered to the jury, in asking it to return a recommendation of life. The jury did so, but the trial judge imposed death notwithstanding their recommendation. The Florida Supreme Court did not quarrel with petitioner's contention that residual doubt as to guilt was the basis of the jury's life recommendation; rather, it simply

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[4] It is important to note that the Florida Supreme Court has recognized that a convicted capital defendant and his attorney, as a matter of principle or strategy, may maintain his innocence, and may forego presentation of other mitigating circumstances which could be viewed as damaging to the integrity of his claim of innocence. Straight v. Wainwright, 422 So.2d 827 (Fla. 1982). See also King v. Strickland, ___ F.2d ___ (11th Cir. 1984) (36 Cr.L. 2251) (noting that a skilled attorney may raise doubt of guilt to a sufficient level that, though not enough to defeat conviction, "might convince a jury and court that the ultimate penalty should not be exacted, lest a mistake may have been made."

reiterated its holding in Buford that doubt as to guilt is, as a matter of law, an unreasonable basis for a jury to recommend life. In so holding, the Florida Supreme Court committed a serious violation of the federal constitutional principles of Lockett and Eddings. Now comes the state, in its brief in opposition to certiorari, and says in mock seriousness, "Maybe the jury recommended life because his mother cried." This is nonsense, or worse. As the Florida Supreme Court has recognized (and as the state is fond of quoting when the shoe is on the other foot), "[t]he law requires that juries be composed of persons of sound judgment and intelligence, and it will not be presumed that they are led astray, to wrongful verdicts, by the impassioned eloquence and illogical pathos of counsel." Paramore v. State, 229 So.2d 855, 860 (Fla. 1969); see also Valle v. State, ___ So.2d ___ (Fla. 1985) (case no. 61,176, opinion filed July 11, 1985) (jurors, in capital sentencing proceeding, are presumed to follow the trial court's instructions as to what evidence they may consider). In Cannady v. State, supra, at 731-32, the Florida Supreme Court recognized that there was a reasonable basis for the jury's life recommendation, and therefore refused to indulge in the speculation (which was given by the trial court as his reason for the override and which was argued by the state on appeal) that the life recommendation might have been based on sympathy for the defendant's family, who had brought an infant child into the courtroom. In the present case, the state did not even argue on appeal that the jury's life recommendation might have been based on something other than residual doubt as to guilt; it merely relied on the constitutionally unsound precedent of Buford to argue that a convicted defendant cannot be "a little bit guilty", and that if petitioner's jury recommended life for this reason, the recommendation was not based on a valid mitigating circumstance, and was as a matter of law unreasonable. [See Appendix F 55-56]. This is the well-defined and important issue which petitioner seeks to litigate in this Court, under the principles of Lockett and Eddings. For the state to come up at this

stage of the proceedings and say, in effect, "Maybe the jury recommended life because they liked Burr's green tie" only demonstrates the state's inability to defend the Florida Supreme Court's position on the merits.

D. Residual Doubt as to Guilt as a Mitigating Circumstance

The state says it finds petitioner's position that residual doubt as to guilt, or the possibility of innocence, is a relevant and reasonable consideration for the jury and judge in determining whether to impose life or death "alarming." [State's brief in opposition, p.10]. Petitioner submits that the position taken by the Florida Supreme Court and by the state is infinitely more alarming. Under the pernicious precedent of Buford and Burr, whenever a jury recommends life because of a genuine concern that the evidence does not foreclose the possibility of the defendant's innocence [see ALI, Model Penal Code, Section 201.6(1), p.107 (Off. Draft 1980)], that recommendation is per se unreasonable, and is subject to being overridden and replaced by a death sentence. While it may be true that any death penalty law entails a possibility that an innocent person may be executed [see Furman v. Georgia, 408 U.S. 238, 366-68 (1972) (Justice Marshall concurring)], what the Florida Supreme Court has done in this case virtually guarantees that this will happen, in situations where it could have been prevented. See Lockett v. Ohio, supra, 438 U.S. at 605 (recognizing that the nonavailability of corrective mechanisms with respect to an executed death sentence underscores the need for individualized consideration as a constitutional requirement in imposing such penalty). A jury's recommendation of life, where it finds that a residual doubt as to guilt exists, is a necessary "safety valve", and is in fact the only safety valve available, since the weight or credibility of "legally sufficient evidence" is no longer reviewable on appeal. See Tibbs v. State, 397 So.2d 1120 (Fla. 1981). But the Florida Supreme Court has told the trial courts of the state that doubt as to guilt is neither a valid mitigating circumstance nor a reasonable

basis for a life recommendation, and so a death sentence is imposed notwithstanding these lingering doubts. What if Charlie Burr is executed and then it turns out that Domita Williams' testimony implicating him was a lie? (As she admitted at trial, under oath, that it was). It would be awful enough if that happened, even if the jury had recommended death. But if it happened despite the jury's recommendation of life, because the Supreme Court of Florida has decided as a matter of law that you can't be "a little bit guilty", it would be constitutionally and morally intolerable.

Virtually all post-Furman death penalty statutes are based on the approach taken in the Model Penal Code as adopted by the 1962 meeting of the American Law Institute. See Proffitt v. Florida, 428 U.S. 242, 247-48 (1976); Gregg v. Georgia, 428 U.S. 153, 189-91, 193-95 (1976); Jurek v. Texas, 428 U.S. 262, 270-71 (1976); Straight v. Wainwright, 422 So.2d 827, 832 (Fla. 1982). Model Penal Code §210.6 provides for a separate penalty proceeding before the trial court and jury, during which various aggravating and mitigating circumstances (most of which are identical or very similar to those enumerated in the Florida statute) may be established and are weighed to determine whether a life sentence or a death sentence is appropriate. However, under certain circumstances, no penalty phase is conducted at all; the trial judge simply imposes a sentence of life imprisonment if one or more of the considerations listed in §201.6(1) are met. One of these circumstances under which a death sentence is excluded is "(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt." In the 1980 Revised Comments to Model Penal Code §201.6 (at p.134), this provision was explained as follows:

> Finally, Subsection (1)(f) excludes the death sentence where the evidence of guilt, although sufficient to sustain the verdict, "does not foreclose all doubt respecting the defendant's guilt." This provision is an accommodation to the irrevocability of the capital sanction. Where doubt of guilt remains the opportunity to reverse a conviction on the basis of new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal.

It needs to be made absolutely clear at this point that petitioner is not arguing that Florida or any other state is constitutionally compelled to adopt or apply the Model Penal Code in its entirety. Rather, petitioner is relying on the Model Penal Code provision (among other sources) because it conclusively demonstrates that some residual, but genuine, doubt as to guilt, and the nature or quantity of the evidence of guilt, are relevant and often compelling considerations in mitigation of a potential death sentence. Indeed, the framers of the Model Penal Code considered these matters to be so critically relevant to the issue of penalty that a death sentence should be precluded, notwithstanding the hypothetical existence of a dozen aggravating circumstances, where the evidence does not foreclose all doubt of guilt.

Since, as the Model Penal Code provision illustrates, the strength or weakness of the evidence of guilt is a consideration reasonably relevant to the question of mitigation of punishment, it is clear that a defendant must be allowed to submit to the jury, as non-statutory mitigation under Lockett, 1) that, while recognizing that he has been found guilty of the capital offense, he maintains his innocence, and 2) that the evidence is not of such a conclusive character as to foreclose the possibility of his innocence. He may attempt to persuade the jury that based on these considerations he should receive a life sentence rather than the irrevocable penalty of death. In the event that the jury agrees, and returns a life recommendation based on these non-statutory mitigating factors, there is a reasonable basis for the recommendation, and (under the Tedder standard) it must be given effect. Otherwise, the Florida death penalty statute is unconstitutional under Lockett v. Ohio. See People v. District Court of State, 386 P.2d 31 (Colo. 1978), in which the Colorado Supreme Court held that state's death penalty statute unconstitutional under Lockett, in that it restricted consideration of mitigating circumstances to those enumerated in the statute. Rejecting the state's suggestion that it construe the subsection setting forth statutory mitigating circumstances as allowing for presentation and consideration of non-statutory mitigation as well, the court noted several impediments to such a construction:

> First, subsection (5) only allows the jury to consider whether the enumerated factors were in existence 'at the time of the offense.' Nothing in the numerous United States Supreme Court decisions cited above supports such a limitation. See Commonwealth v. Moody, 476 Pa. 223, 382 A.2d 442, 449-50, n.19 (1977).
>
> Second, factors (5)(b) through (5)(e) are all in the nature of affirmative defenses. Thus, if the offender maintains his innocence, he is precluded from offering any mitigating circumstances at all, except that he is under the age of eighteen.

People v. District Court of State, supra, at 35.

The most compelling reason why residual doubt as to guilt must be recognized as a legitimate mitigating circumstance and as a reasonable basis for a life recommendation is the simple undeniable fact that an innocent person can be convicted. Charlie Burr maintains his innocence; as a matter of law he is guilty, but as a matter of fact he may not be. As Justice Marshall, concurring in Furman v. Georgia, supra, 408 U.S. at 366-68 (1972) observed:

> Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our "beyond a reasonable doubt" burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is latter convincingly established are convicted and sentenced to death.
>
> * * *
>
> No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some.

The foregoing was written by Justice Marshall in support of his position (which he and Justice Brennan have maintained in Furman and in all cases thereafter) that the death penalty is unconstitutional per se. However, even assuming arguendo that the death penalty may constitutionally be imposed under certain circumstances, a state cannot preclude consideration by the judge and jury of relevant mitigating factors proffered by the defendant as a basis for a sentence less than death. Lockett v. Ohio, supra; Eddings v. Oklahoma, supra. The Florida Supreme Court's obdurate refusal to recognize residual doubt as to guilt as a legitimate

mitigating circumstance or even as a relevant consideration in capital sentencing brings it into direct conflict with the principles set forth by this Court in Lockett and Eddings. To resolve this conflict, and to prevent the miscarriages of justice which are certain to follow in the wake of the Florida precedent, this Court should grant certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to the Honorable Alexander L. Stevas, Clerk of the Supreme Court of the United States, First and Maryland Avenue, Northeast, Washington, DC 20543; Mr. Charlie L. Burr, Jr., #084592, Post Office Box 747, Starke, Florida, 32091; and by hand delivery to the Honorable Sid White, Clerk of the Supreme Court, State of Florida, Tallahassee, Florida, 32301 and to Gregory G. Costas, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 14 day of August, 1985.

DAVID A. DAVIS
Assistant Public Defender

NO. 84-6982

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CHARLIE L. BURR,

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v.

STATE OF FLORIDA,

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Excerpts from Defense Counsel's Closing Argument
in the Penalty Phase

You are not limited to just those two [mitigating circumstances]. You can consider anything that you feel is appropriate to consider in terms of mitigation in this case in trying to make your recommendation to the judge.

One aspect I think you should consider and I ask you again to consider it and I argued to you at the close of the evidence before you retired to your verdict. I think obviously from your verdict you didn't agree with my arguments I made at the close of the trial. Hopefully, you believe beyond a reasonable doubt that Mr. Burr is the one who committed the offenses or you wouldn't have returned that verdict back. That's obvious. But, I ask you to think now as you turn your attention to what penalty you will recommend in this case, think about what you heard the evidence in this case to be.

Is it an overwhelming case of guilt here? Was it an overwhelming case of guilt here? You have Domita Williams. She's the only one that could possibly, in any way, link Mr. Burr to the offenses that were charged at the Suwannee Swifty. And you know -- I'm not going to go over that. She has come in here and told you that she hasn't been telling the truth the whole time.

She came in the second day of the trial and said that she had not been telling the truth, that she wasn't there at the time.

Now, you have to ask yourself, as you make a recommendation, you know, one way or the other in this case, is it possible -- is it possible that I'm recommending death for an innocent person? Is it possible that Mr. Burr did not commit these offenses?

Are you so sure that Domita Williams was not being truthful to you? Again, I reiterate that. Are you so sure she was not being truthful with you the second day she testified? Or are -- you heard testimony about Melbourne and Mr. Burr may have committed the offenses in Melbourne. Are you so sure you didn't render your verdict based on the fact that, well, he must have done this because the evidence showed that he did that, he must have done this.

But, does that logically, just necessarily go together? Could not Mr. Burr be innocent of the offense here and maybe he is guilty of the offense down there. He has to stand trial down there for those offenses. If the State had enough evidence again down there, then he will be convicted and he will have to face the consequences.

But, in this particular case, from all that you have heard from the various witnesses, are you so sure that Mr. Burr committed this offense? He has pled not guilty. He maintains his innocence

in this case. Nobody knows -- that the State presented -- only Domita Williams possibly could know. And she testified one way and then she testified the second day that she wasn't being truthful. Nobody else knows.

Mr. Meggs doesn't know what happened at the Suwannee Swifty that morning. Sergeant Ash doesn't know what happened at the Suwannee Swifty that morning. None of the witnesses the State called knows what happened at the Suwannee Swifty that morning.

The only thing you can rely on is Domita Williams. And she came in and told you that she wasn't there that particular morning. And there was other evidence to support her saying that. There was evidence that may have obviously supported that she was being truthful the first day. But, there is evidence that has indicated she could be truthful the second day. So, in terms of your recommendation in this case, I know it's a difficult situation and nobody picked -- you know, none of you picked to be on the jury in this case.

But, I know you have all been very attentive. I know it's been an ordeal for you. It's been an ordeal for me. It's been an ordeal for everybody involved in this case.

But, if you go back and recommend death in this case on the evidence that was presented at this trial as to what happened here and Mr. Burr is eventually electrocuted and put to death, then it's going to be a little too late for the truth to come out, because the truth is going to be -- it just wont' stop here. Things will be -- the truth will come out.

And I just ask you to consider all of the evidence in this case that you heard and ask yourself whether you are so sure that you can't be making a mistake in this case, there is no way that you can be mistaken in this case. And I think there are some serious questions about just what happened and whether Mr. Burr in fact committed the offenses charged here. (R 461-65).

. . . .

... So, ladies and gentlemen, with the doubts -- and there's got to be some question about what you heard. With that in mind and those considerations in mind, don't make a recommendation where a man is going to die when he may not have even committed the crime. Thank you. (R 466).